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EXCELSIOR 5078

# Supreme Court of the United States

October Term, 1943

No. 131

EASTERN WINE CORPORATION,  
*Petitioner,*  
*vs.*

G. H. MUMM CHAMPAGNE (SOCIETY VINICOLE DE  
CHAMPAGNE, SUCCESSORS) AND ASSOCIATES INCOR-  
PORATED, AND SOCIETY VINICOLE DE CHAMPAGNE,  
*Respondents.*

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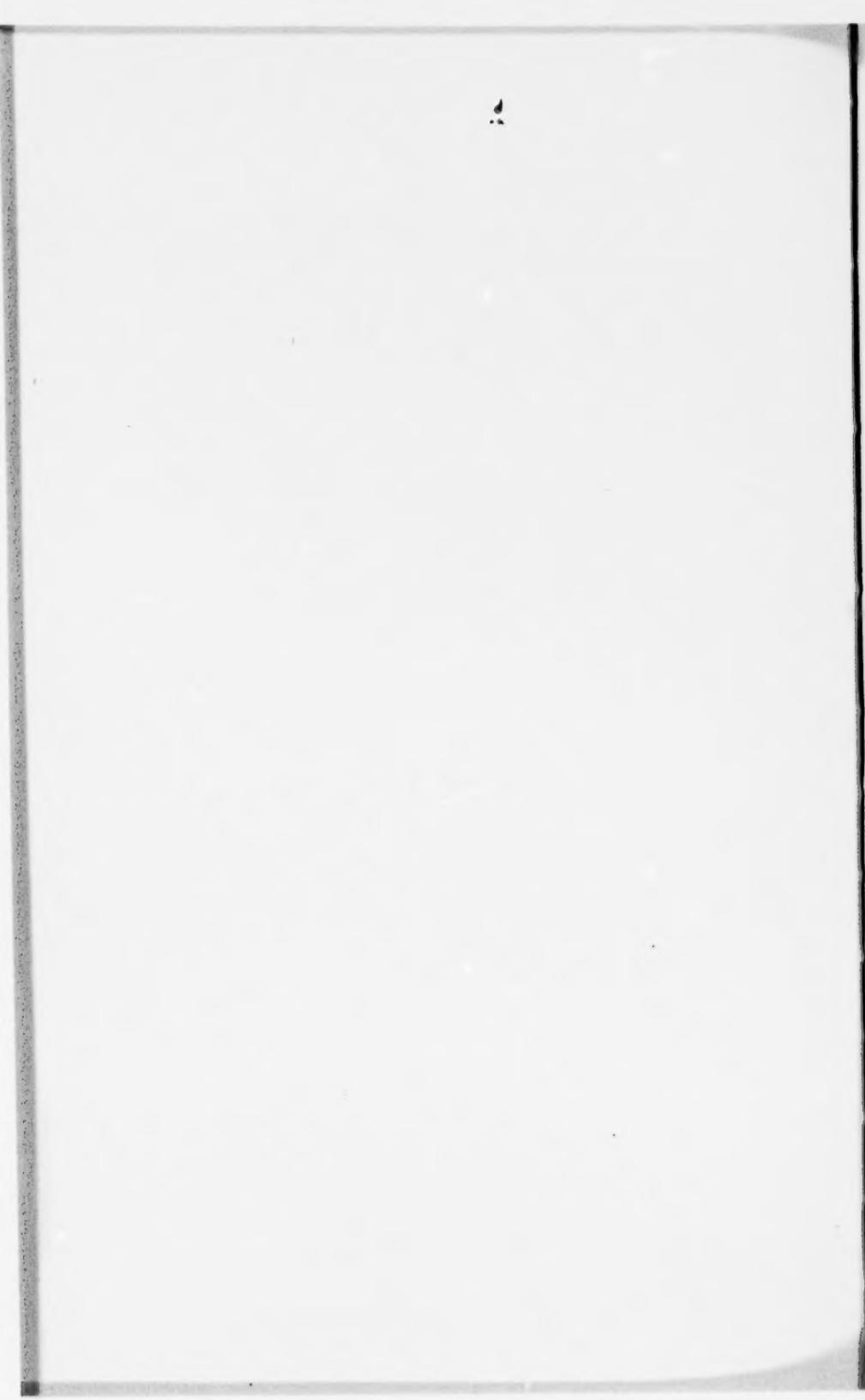
**PETITION OF EASTERN WINE CORPORATION  
FOR A WRIT OF CERTIORARI TO THE CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT,  
WITH BRIEF IN SUPPORT THEREOF.**

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SAMUEL E. DARBY, JR.,  
*Counsel for Petitioner.*

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# Supreme Court of the United States

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No. \_\_\_\_\_

EASTERN WINE CORPORATION,

*Petitioner,*

*vs.*

G. H. MUMM CHAMPAGNE (Society Vinicole de Champagne, Successors) AND ASSOCIATES INCORPORATED,  
and SOCIETY VINICOLE DE CHAMPAGNE,

*Respondents.*

---

## **PETITION OF EASTERN WINE CORPORATION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your Petitioner, Eastern Wine Corporation, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the judgment of that Court entered on the 27th day of April, 1944.

A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

### **Summary and Short Statement of the Matter Involved.**

1. Plaintiff, Society Vinicole de Champagne, is a corporation of France and hereinafter will be referred to as

"Foreign Plaintiff". Since 1883 it (or its predecessor) has manufactured and sold the well known "Mumm" champagnes, to one quality of which it applied the trade-mark comprising the words "Cordon Rouge".

2. Foreign Plaintiff effected a number of trade-mark registrations for its "Cordon Rouge" champagne, with only two of which (Nos. 177,419 and 312,653) we are here concerned. They each comprise the words "Cordon Rouge" printed on a red stripe diagonally extending across a rectangular white field.

3. In 1934 Foreign Plaintiff caused to be incorporated in the State of Delaware co-plaintiff G. H. Mumm Champagne (Society Vinicole de Champagne, Successors) and Associates Incorporated, and since then has owned and now owns 53% of the stock therein, the remainder of the stock being owned by "different foreign associates abroad" (R. 38-39). This Delaware corporation will hereinafter be referred to as "Domestic Plaintiff".

4. Since its creation in 1934 Domestic Plaintiff has purchased outright the Mumm champagnes from Foreign Plaintiff—including the Cordon Rouge champagne—and has resold them in the United States.

5. The relationship between Domestic Plaintiff and Foreign Plaintiff is expressed by a written agreement dated January 1, 1938 (R. 70) whereby Domestic Plaintiff purchases champagnes exclusively from Foreign Plaintiff; and the latter sells its champagnes for resale in the United States solely to Domestic Plaintiff. With reference to the trade-marks of Foreign Plaintiff, the agreement provided (R. 70):

"4. The producer [Foreign Plaintiff] will protect and enforce its trade-marks in the United States

of America against any infringement thereof, and the importer [Domestic Plaintiff] will promptly acquaint the producer of any conduct by competitors believed to constitute an infringement of producer's rights, and of all facts in respect thereto, together with recommendations as to proposed procedure for the producer's instructions and disposition, and any expenses for legal proceedings consequent thereupon will be borne by the producer for the protection of the producer's rights."

6. In 1939 this agreement was changed, by mutual consent, by creating another purchaser in the United States (in the Pacific Coast area) of the champagnes of Foreign Plaintiff (R. 45).

7. Petitioner, Eastern Wine Corporation, was incorporated in the State of New York in 1934, and since then has been a purveyor of domestic champagne for which it adopted the trade-mark "Chateau Martin". Since about January 1941 Petitioner used the trade-mark "Chateau Martin" printed in gold letters on a red stripe extending diagonally across a white field.

8. The complaint, verified only by Domestic Plaintiff, was filed in this case by Domestic Plaintiff as the asserted "agent" of Foreign Plaintiff on November 13, 1942, charging infringement of *Foreign Plaintiff's* trade-marks by Petitioner's use of its "Chateau Martin" labels, as well as unfair competition with Domestic Plaintiff *by reason of said trade-mark infringement* (R. 7). Foreign Plaintiff, though named as plaintiff in the action, did not sign or verify the complaint and did not authorize the filing thereof. Indeed, because of the then enemy alien status of Foreign Plaintiff it is the conceded fact that Domestic Plaintiff has had no communication of any kind or nature whatsoever with Foreign Plaintiff relative to this case (R. 41).

9. Petitioner answered the complaint, denying trademark infringement and unfair competition because thereof, asserting that Foreign Plaintiff as owner of the trade-marks was a necessary and indispensable party to the suit so that its absence as a party was fatal to the case; and asserting that by reason of the fact that Foreign Plaintiff was in the status of an enemy alien under the Trading with the Enemy Act (50 U. S. C. A. Appendix 10), any "agency" relationship that may have existed between Domestic and Foreign Plaintiffs was abrogated, wherefore at the time of filing the complaint and at all times thereafter Domestic Plaintiff was wholly without legal or actual authority to institute or to maintain this suit in Foreign Plaintiff's behalf.

10. On the pleadings and a pre-trial deposition of the President of Domestic Plaintiff both parties moved for summary judgment, and the motions were argued and briefed.

11. On October 14, 1943 the District Court filed its opinion (R. 21) in which it was concluded that Foreign Plaintiff was an enemy alien and that Domestic Plaintiff was an "agent" of Foreign Plaintiff; and that despite these conclusions the complaint could be maintained.

12. Findings of Fact and Conclusions of Law consistent with the opinion were entered on December 13, 1943 (R. 28, 30), and Interlocutory Judgment was entered on the same day (R. 31).

13. On April 27, 1944 the Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

14. Because of the important and far reaching effect of the decision in this case, which vests a party to a mere sales agreement with the legal attributes of an "agent" empowered to sue for infringement of a trade-mark owned by an enemy alien and thereby maintains alive a commercial

relationship and agreement expressly abrogated by the Trading with the Enemy Act, this petition is presented.

### **Questions Presented.**

1. May a suit for trade-mark infringement, and for unfair competition because of trade-mark infringement, be maintained in the absence of the owner of the trade-mark as a party litigant?
2. Does a mere non-exclusive commercial sales agreement vest an enemy alien owned domestic corporation with the right or authority to maintain a suit for alleged infringement of trade-marks owned by the enemy alien?
3. Is not a mere non-exclusive commercial sales agreement between a domestic corporation and an enemy alien expressly abrogated by the Trading with the Enemy Act?

### **Reasons Relied Upon for the Grant of a Writ of Certiorari.**

The discretionary power of this Court is invoked upon the following grounds:

1. Because the Court of Appeals for the Second Circuit has rendered a decision in this case which is believed to be untenable in view of the applicable decisions of this Court.
2. Because the Court of Appeals for the Second Circuit has rendered a decision which is believed to be untenable because of the provisions of the Trading with the Enemy Act.
3. Because the issues here presented are of great public importance in that they relate to and are based upon the question of the propriety, during wartime, of the utilization of our Courts by enemy aliens for the prosecution of monetary claims against citizens of the United States.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court directed to the United States Court of Appeals for the Second Judicial Circuit commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record of all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court as to the questions herein presented, and that the judgment of the Court of Appeals be reversed, and that petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

SAMUEL E. DARBY, JR.,  
*Counsel for Petitioner.*

Dated: New York, New York,  
June 2, 1944.



**BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI.**

**Opinions of the Courts Below.**

The opinion of the District Court will be found beginning at page 21 of the record, and has been reported in 52 F. Supp. 167.

The opinion of the Court of Appeals for the Second Circuit is not yet reported, but will be found beginning at page 115 of the record.

**Jurisdiction.**

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is April 27, 1944.
2. The judgment was rendered in a civil action brought under the trade-mark statutes to determine the issues of validity and infringement of trade-marks.
3. The statute under which jurisdiction is invoked is 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925.
4. Cases believed to sustain the jurisdiction are:

*The William Bagaley*, 72 U. S. 377;  
*Green v. Electric Vacuum*, 319 U. S. 777;  
*Mishawaka v. S. S. Kresge*, 316 U. S. 203.

**Statement.**

The facts are sufficiently stated in the petition.

### **Specification of Errors.**

The errors which petitioner will urge, if the petition for certiorari is granted, are that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that Foreign Plaintiff, a necessary party to the litigation, is properly before the Court.
2. In holding that Domestic Plaintiff is an "agent" of Foreign Plaintiff with right or power to institute or maintain this suit.
3. In failing to hold that the "agency" agreement, if it accorded Domestic Plaintiff any right or power to institute and maintain this suit, was abrogated by the Trading with the Enemy Act prior to the institution of the suit so that it could not properly be instituted or maintained.
4. In failing to order the dismissal of the complaint.

### **Summary of Argument.**

The points of argument follow the questions presented and are stated on page 5 of this petition, as well as in the index hereto. For the sake of brevity they are omitted at this point.

## **ARGUMENT.**

### **POINT I.**

**A suit for trade-mark infringement, and for unfair competition because thereof, may not be maintained in the absence of the owner of the trade-mark as a party litigant.**

There can be no doubt but that Foreign Plaintiff is an indispensable party to the present action brought for al-

leged infringement of its trade-mark. This Court in *Mallow v. Hinde*, 25 U. S. 12, Wheat. 193 said:

" \* \* \* no court can adjudicate directly upon a person's right, without the party being actually or constructively before the Court."

See also

*State of California v. Southern Pacific Co.*, 157 U. S. 229.

Indeed, the trade-mark statute (15 U. S. C. A. Sec. 96) prescribes liability for damages for infringement of a trade-mark only "at the suit of the owner thereof"; and consistently it has been held that a suit for infringement of trade-mark

" \* \* \* rests 'on the ownership of the trade marks' and 'title to the trade marks is indispensable to a good cause of action'."

*Perry v. American Hecolite Denture Corp.*, 78 F. (2d) 556; see also 63 Corpus Juris Sec. 135.

Therefore, it is obvious that Foreign Plaintiff, as owner of the trade-marks, is a necessary and indispensable party litigant in this cause.

Of course, the mere inclusion of the name of Foreign Plaintiff in the title to the cause, and in the complaint, does not make Foreign Plaintiff a party to the suit.

The complaint was verified by Mr. Mulligan, President of Domestic Plaintiff, and his examination before trial developed that the suit for alleged infringement of Foreign Plaintiff's trade-mark was instituted without the knowledge or consent of Foreign Plaintiff, and that the inclusion of Foreign Plaintiff's name as a plaintiff was likewise without its knowledge or consent. Mr. Mulligan was asked (R. 41):

"Q. Tell me what, if anything, the Domestic Plaintiff did to get the consent of the Foreign Plaintiff in bringing this suit? A. That was impossible owing to laws promulgated by our Government, making it unlawful to communicate with our principals.

Q. Then it is correct to state that the Domestic Plaintiff joined the name of the Foreign Plaintiff in this cause without getting the consent of the Foreign Plaintiff? A. That is true, but due entirely to the abnormal conditions existing making it impossible to communicate.

Q. And it is also true that Mr. Aitken, the attorney in this cause, was retained only by the Domestic Plaintiff, is that correct? A. That is true."

It would seem to be obvious, therefore, that the complaint in this cause is fatally defective for want of the necessary plaintiff, unless, factually, when the complaint was filed Domestic Plaintiff was an "agent" of foreign plaintiff in the sense that it was vested with the power or authority to sue for alleged infringement of its trade-mark.

## POINT II.

**The mere, non-exclusive, commercial sales agreement did not vest in Domestic Plaintiff an agency carrying with it the right or authority to maintain a suit for alleged infringement of trade-marks owned by the enemy alien Foreign Plaintiff.**

The relationship between the plaintiffs at the time the complaint was filed in November 1942 is shown by the agreement of January 1, 1938 (R. 35, 70), as amended in 1939 to become non-exclusive in character (R. 45). That agreement was merely and wholly commercial in character between a buyer and a seller whereby Domestic Plaintiff agreed to purchase its wines for resale in the United States exclusively from Foreign Plaintiff and Foreign Plaintiff

reciprocally agreed that it would sell its wines for resale in the United States to Domestic Plaintiff and one other. Thus there is not here present a single attribute incident to the legal relationship of principal and agent (Cf. *Matthews Conveyer Co. v. Palmer*, 135 F. (2d) 73, 77; *Restatement of Law of Agency*, Sec. 1, p. 8; Sec. 13, p. 46; *S. B. McMaster v. Chevrolet Motor Corp.*, 3 F. (2d) 469).

Additionally, in so far as the trade-mark rights of Foreign Plaintiff are concerned the agreement expressly excludes any possible thought of any interest therein by Domestic Plaintiff, or of the power or authority of Domestic Plaintiff to take any action against any one with respect thereto.

It is quite obvious therefore that the relationship between Foreign and Domestic Plaintiffs—established solely and entirely by the agreement between them—is not one which vested Domestic Plaintiff with the power or authority to institute or maintain the present action.

### POINT III.

**The mere, non-exclusive, commercial sales agreement between Foreign and Domestic Plaintiffs was abrogated by the Trading with the Enemy Act.**

Regardless of whatever was vested in Domestic Plaintiff by the sales agreement which alone constituted the relationship between Foreign and Domestic Plaintiffs, the agreement was abrogated, prior to the institution of the present suit, by the declaration of war, by the Trading with the Enemy Act, wherefore the suit neither properly could be instituted nor maintained. Section 3 of that Act makes it unlawful:

“(a) For any person in the United States, except with the license of the President granted to such

person, or to the enemy or ally of enemy as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or in conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.”

And Section 2 of the Act defines the words “to trade” as used therein, as meaning:

“(e) Enter into, carry on, complete or perform any contract, agreement, or obligation.

(d) Buy or sell, lend or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commerce, communication or intercourse with.”

Therefore, even if the agreement between Foreign and Domestic Plaintiffs constituted the latter an “agent” of the former (and we submit that obviously it did not) the declaration of war abrogated the agreement and all relationships thereunder so that the present suit could not be instituted or maintained by Domestic Plaintiff in the name or in behalf of Foreign Plaintiff.

It is true that the Trading with the Enemy Act *permits* the prosecution of a suit for trade-mark infringement *by an enemy alien* (U. S. C. A. Title 50, App. 10 (g)), but this may not be done by an “agent” of an enemy alien principal. It can only be done under a power of attorney, the continuing validity of which alone is expressly provided for by paragraph 10(h) of the Act. Clearly, here the con-

tractual arrangements between Foreign and Domestic Plaintiffs by no stretch of the imagination, by language, intent or implication, constituted Domestic Plaintiff the attorney of Foreign Plaintiff in fact or in law, or vested Domestic Plaintiff with a power of attorney to institute a trade-mark infringement suit.

### ***Conclusion.***

It is submitted, therefore, that the Court of Appeals for the Second Circuit committed error in sustaining the right of Domestic Plaintiff to institute and maintain the present suit in the name and in behalf of Foreign Plaintiff.

It is of great public importance, particularly at this time, for this Court to pass upon the question of whether or not an enemy alien, merely by virtue of a commercial sales agreement entered into prior to the war, may prosecute claims during the war for monetary recoveries and equitable relief. All such agreements were abrogated by the Trading with the Enemy Act upon the declaration of war. The purpose of that Act judicially should not be defeated.

***It is submitted therefore that the petition should  
be granted and the questions here submitted passed  
upon by this Court.***

Respectfully submitted,

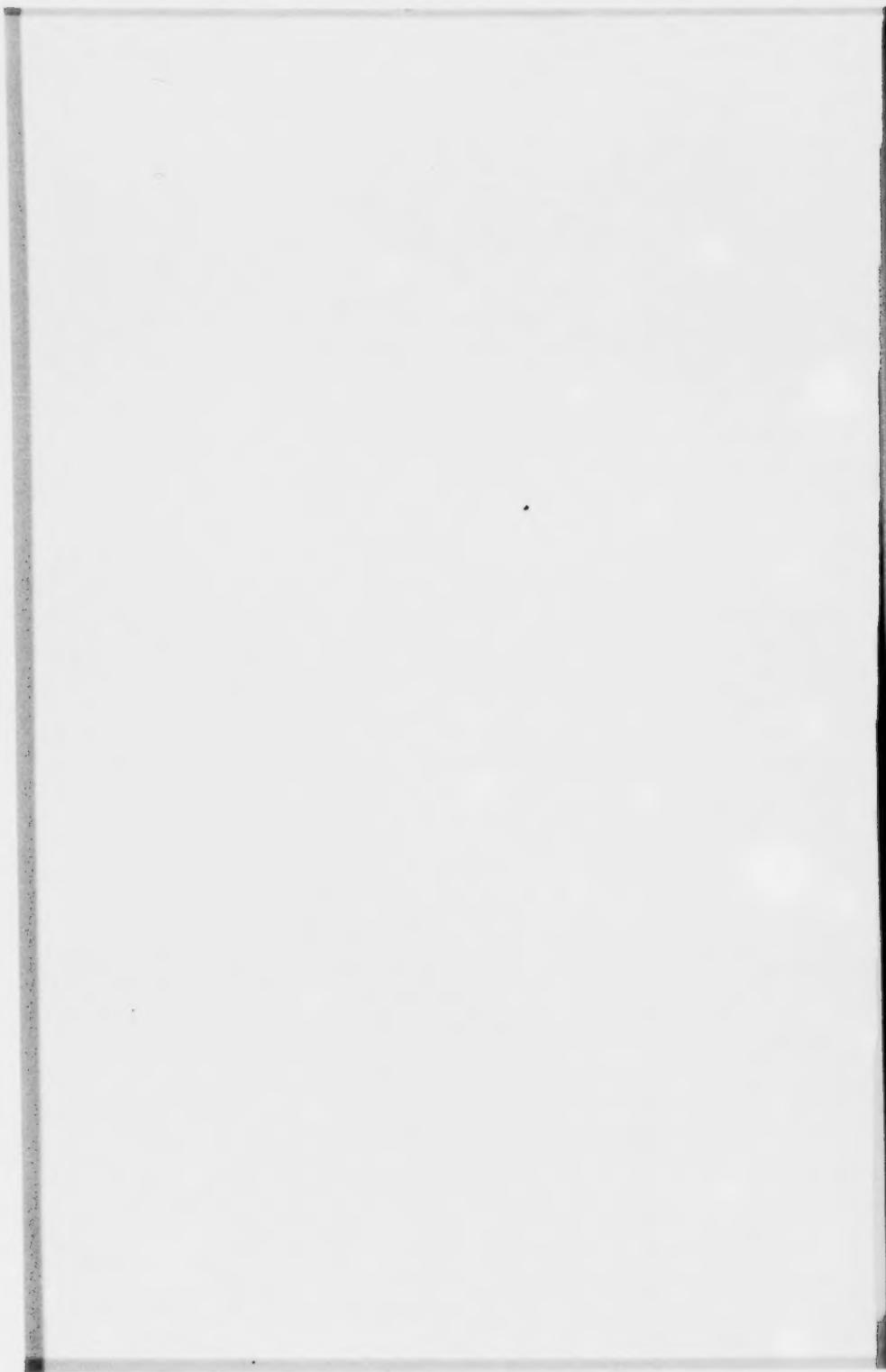
SAMUEL E. DARBY, JR.,  
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JULY 20

CHARLES ELIOT

# Supreme Court of the United States

OCTOBER TERM, 1943.

(No. 1082.)

131

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EASTERN WINE CORPORATION,

*Petitioner,*

—against—

G. H. MUMM CHAMPAGNE (Societe Vinicole de Champagne,  
Successors) AND ASSOCIATES INCORPORATED, and SOCIETE  
VINICOLE DE CHAMPAGNE,

*Respondents.*

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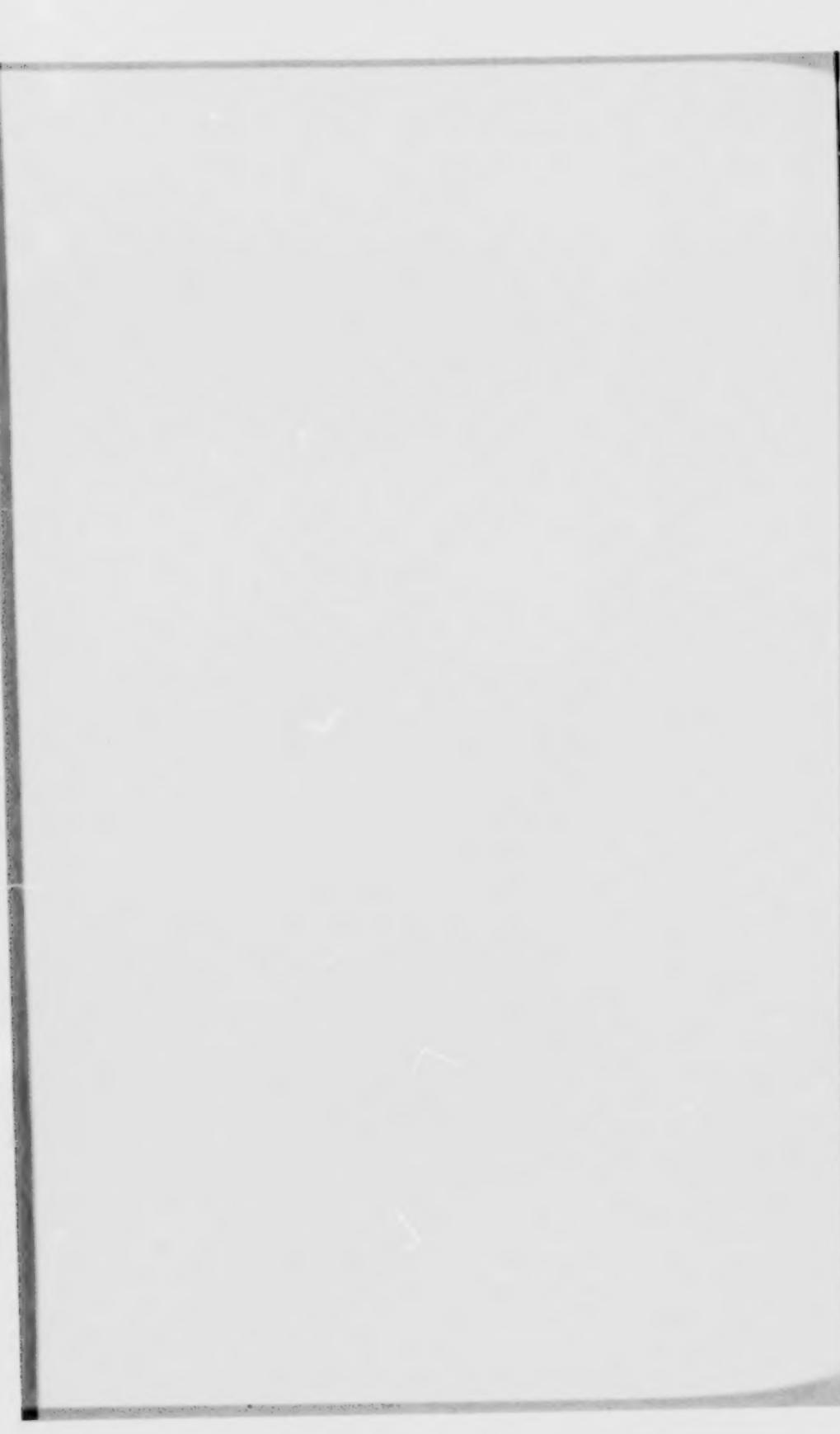
## BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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# Supreme Court of the United States

OCTOBER TERM, 1943.

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EASTERN WINE CORPORATION,

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Respondents.

(No. 1082.)

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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### STATEMENT.

We are adding this brief statement of the case to supplement the petitioner's statement.

### FACTS.

The plaintiff Mumm Company of Delaware (hereinafter called Domestic Plaintiff) is the exclusive representative in the Eastern United States for the sale of Mumm champagne, produced by the plaintiff Societe Vinicole de Champagne (hereinafter called French Plaintiff). The French Plaintiff owns 53% of Domestic Plaintiff's common stock, and all its preferred stock.

About January, 1941 (when the French Plaintiff had been for over six months in the hands of the German invaders), the Defendant began to use on its champagne bottles the diagonal red stripe which had been for many years the distinguishing feature of Mumm's famous "Cordon Rouge"

brand, and Defendant continued this use despite the prompt and specific written protest of the Domestic Plaintiff (R. 108-113).

Thereafter Domestic Plaintiff, in its own behalf and in behalf of the French Plaintiff, sued the Defendant in the Federal District Court for trademark infringement and unfair competition. The District Court granted summary judgment to both Plaintiffs for an injunction and an accounting —for infringement as to the French Plaintiff and unfair competition as to the Domestic Plaintiff. This judgment was unanimously affirmed by the Second Circuit Court of Appeals.

Both Courts held as follows:

(1) Defendant was guilty of trademark infringement as to the French Plaintiff and unfair competition as to the Domestic Plaintiff, and should be enjoined as to both; and should also account to both plaintiffs, any payment to the French Plaintiff, however, to be made only after the war and on further order of the Court.

(2) The Domestic Plaintiff, as exclusive agent, had a sufficient interest to enable it to sue in its own behalf for unfair competition.

(3) The Domestic Plaintiff had authority to sue in behalf of the French Plaintiff for infringement.

#### **ARGUMENT.**

#### **THE CASE INVOLVES PURELY QUESTIONS OF FACT, WHICH WERE CORRECTLY DECIDED BY BOTH LOWER COURTS IN PLAINTIFFS'S FAVOR.**

It is not altogether clear whether the petition here seeks to review only the injunction and accounting for trademark infringement in favor of the French Plaintiff, or in addition the injunction and accounting in favor of the Domestic Plaintiff.

However, there seems to be no basis for seeking a review of the concurrent finding that petitioner competed unfairly with the Domestic Plaintiff, as to which the District Court said (R. 25) :

"The defendant's course of conduct is a patent evasion, is calculated to mislead the public, and subject the domestic plaintiff to irreparable injury in respect to the unsold product of the Producer which it has on hand and which it has expended large sums of money to advertise and market. Clearly this makes out a case of unfair competition."

The Circuit Court of Appeals summarized a longer analysis as follows:

"As we have just said, after the defendant's present make-up was challenged, there could no longer be any defense against deliberate imitation."

Both Courts found that petitioner's objection that the Domestic Plaintiff has no interest to protect "is without substance" (R. 25, 118-119). The Circuit Court of Appeals cited with approval its earlier holding in *Scandinavian Belting Co. vs. Asbestos & Rubber Works of America*, 257 Fed. 937 (in which this Court denied certiorari, 250 U. S. 644), "that a person in the Delaware company's position had enough interest to register the trademark as its own" (R. 119).

As often stated by this Court, its well settled rule is not to disturb concurrent findings of fact by two courts in the absence of very exceptional showing of error. *Baker vs. Schofield*, 243 U. S. 114, 118; *Williams Mfg. Co. vs. United Shoe Machinery Corp.*, 316 U. S. 364, 367; *Goodyear Tire & Rubber Co., Inc. vs. Ray-O-Vac Co.* (Feb. 28, 1944), 88 Law ed. 475, 476; *Tennessee Coal, Iron & Railroad Co. vs. Muscoda Local No. 123* (March 27, 1944), 88 Law ed. 610, 618.

But it would seem that petitioner's three alleged reasons for certiorari as to the French Plaintiff's judgment have no better footing than would a petition to review the judgment for unfair competition as to the Domestic Plaintiff. All three reasons depend solely on the Domestic Plaintiff's authority to sue in the French Plaintiff's behalf—a single narrow question of fact, which has also been determined against the petitioner by the concurrent findings of the Courts below. Both District Court and Circuit Court of Appeals correctly decided that the Domestic Plaintiff had this authority, and could continue to exercise it under the express authority of Sec. 10(g) and (h), Title 50, U. S. Code.

This extremely narrow question, whether the petitioner, already subject to injunction and accounting in favor of the Delaware Plaintiff, may be relieved of possible additional accountability to the French Plaintiff, would seem to be peculiarly unsuitable to induce this Court to grant certiorari. Nor has the conduct of the petitioner as found by the Courts herein been such as to entitle it to exceptional consideration.

The three cases cited in petitioner's brief at page 7 "to sustain the jurisdiction" do not seem in point.

*The William Bagaley*, 72 U. S. 377, dealt with the general effect of war on partnerships between citizens of the opposing belligerents, but can have no bearing on a suit specifically permitted by statute, as here, to be prosecuted by an enemy alien. (Sec. 10(g) and (h), Title 50, U. S. Code.)

In *Mishawaka Mfg. Co. vs. Kresge Co.*, 316 U. S. 203, this Court declined to review the factual extent of infringement found by the lower Courts, but did review and reverse the rule of law laid down by them as to the measure of damages for infringement, as being unduly favorable to the wrong-doer. The establishment of the correct rule of damages was naturally of great public importance, governing as it doubtless would the majority of cases of this kind, including the present one. But the extent of infringement, as of authority in the present case, was a pure question of fact, dependent on the peculiar circumstances of each individual case.

The third case cited by petitioner, *Green vs. Electric Vacuum*, 319 U. S. 777, seems irrelevant, for there the petition for certiorari was withdrawn before it was acted on.

The French Plaintiff is not an indispensable party. Domestic Plaintiff since the year 1933, has been and continues to be the sole and exclusive agent and source of origin for goods in the eastern portion of the United States, for importation and sale of champagne bearing the trade mark. It purchases the champagne outright, without compensation or commission. With full title vested in it, sales of the product are its own; it is known as the exclusive source and origin for the goods. Under these circumstances it is "owner" of the mark and may sue in its own name, as held in *Scandinavian Belting* case, *supra*, this Court denying certiorari. French Plaintiff is a proper party but not a necessary or indispensable party; and within the meaning of the trade mark statute (15 U. S. C. A. Sec. 96) Domestic Plaintiff is "owner" of the trade mark in issue.

Domestic Plaintiff is agent for French Plaintiff; both Courts below considered it as having authority to sue in its name and in behalf of its principal. The agreement (R. 70-71) establishes all elements of an agency. Domestic Plaintiff agrees to import champagne exclusively from the other, while the latter agrees to sell exclusively to the former, and agrees "to devote its best efforts to the sale of wines \* and in every way to promote a demand for such goods" in this country. Both Courts deemed Domestic Plaintiff to have under elementary principles of agency implied authority to make its principal a party to the action.

This agency was not terminated by war. The decisions of this Court have uniformly held the existence of war does not terminate an agency of this kind. *Williams vs. Paine*, 1 U. S. 55, 70, 73; *Sutherland vs. Mayer*, 271 U. S. 272, *Second Russian Ins. Co. vs. Miller*, 297 Fed. 404, (aff'd. U. S. 552), *Ward vs. Smith*, 7 Wall. 447, 452-453, *Lamar vs. Licou*, 112 U. S. 452, 464.

The provisions of the Trading with the Enemy Act expressly provide the French Plaintiff may maintain this

action. Section 10(g) provides "Any enemy \* \* \* may institute and prosecute suits \* \* \* to enjoin infringement of \* \* \* trade mark \* \* \* in the United States \* \* \*" and Section 10(h) provides "All powers of attorney granted by an enemy \* \* \* to any person within the United States, in so far as they may be requisite to the performance of acts authorized in subsections (a) and (g) [above] shall be valid."

#### **CONCLUSION.**

This petition should be denied as it presents none other than facts already determined by both the District and Circuit Courts. Without conflict in decisions, this Court is respectfully urged to affirm these factual findings of the Circuit Court.

Respectfully submitted,

BEEKMAN AITKEN,  
Attorney for Respondents.

WATSON WASHBURN, Esq.,  
of Counsel for Respondents.

